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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OMAR BIBI, M.D.,

Plaintiffs,

v.

VxL Enterprises, LLC; Daniel & Yeager, LLC; Sycamore Provider Contracting, LLC; Team Health, LLC,

Defendant.

Case No. 3:21-cv-04670-EMC

NOTICE OF MOTION AND PARTIAL MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 31, 2022
Time: 1:30 p.m.
Ctrm: 5

Complaint Filed: June 17, 2021
FAC Filed: September 24, 2021
SAC Filed: January 18, 2022

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 31, 2022 at 1:30 p.m. in Courtroom 5 before the Honorable Edward M. Chen of the United States District Court, Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants Daniel & Yeager, LLC ("D&Y") and Team Health, LLC ("Team Health," collectively, "Defendants") will and hereby do move this Court for an order granting their Partial Motion to Dismiss Plaintiff Omar Bibi, M.D.'s ("Plaintiff") Second Amended Complaint ("SAC.")

Specifically, Defendants request that the Court dismiss Plaintiff's First Cause of Action with prejudice **as to Defendant Team Health** pursuant to the Federal Rule of Civil Procedure § 12(b)(6), on the grounds that Plaintiff fails to allege sufficient facts to state a claim as required by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

Defendants also request that the Court dismiss Plaintiff's Second Cause of Action with prejudice **as to both Defendants** pursuant to the Federal Rule of Civil Procedure § 12(b)(6) on the grounds that Plaintiff fails to allege sufficient facts to state a claim as required by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

This Motion is based on this Notice of Motion and Motion, the following Memorandum of Points and Authorities in Support, the pleadings, records and papers filed in this action, the arguments of counsel, and any such further evidence as the Court may consider at, before or following the hearing on this Motion.

DATED: February 22, 2022

SEYFARTH SHAW LLP

By: */s/ Lauren S. Schwartz*
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Daniel & Yeager, LLC and Team Health, LLC

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I. INTRODUCTION

Three strikes and he is out. Despite having yet another opportunity to remedy his defective pleading, Plaintiff Omar Bibi, M.D.'s Second Amended Complaint ("SAC"), which is his third attempt to plead a viable complaint, remains defective. Defendants Daniel & Yeager, LLC ("D&Y") and Team Health, LLC ("Team Health") thus move to dismiss Plaintiff's First Cause of Action for retaliation **as to Team Health** and Plaintiff's Second Cause of Action for a failure to hire **as to both Defendants**, with prejudice, on numerous grounds, including several that were already identified in Defendants' prior motion to dismiss:

First, Plaintiff's retaliation claim as to Team Health was already dismissed by this Court for a failure to state a claim and Plaintiff does not allege any new facts to establish that Team Health is a proper defendant to this claim. Thus, this claim cannot stand against Team Health and must be dismissed.

Second, Plaintiff's failure to hire claim fails because Plaintiff did not and could not remedy the defects identified by the Court—namely, he has once again failed to plausibly allege that he engaged in a protected activity that was known to Team Health and that there is a causal connection between such conduct and an adverse action.

Third, Plaintiff's failure to hire claim fails for the additional reason that it offers nothing more than "labels or legal conclusions" and instead offers "naked assertions devoid of further factual enhancement," which do not state a claim upon which relief may be granted.

Fourth, at minimum, Plaintiff's failure to hire claim as to D&Y fails because D&Y is not a proper defendant to this claim.

For these reasons, the Court should grant Defendants' Partial Motion to Dismiss and enter an order dismissing Plaintiff's First Cause of Action for retaliation as to Team Health and Plaintiff's Second Cause of Action for failure to hire as to both Defendants, without leave to amend.

II. THIS COURT PREVIOUSLY DISMISSED ALMOST THE ENTIRETY OF PLAINTIFF'S FIRST AMENDED COMPLAINT

On November 8, 2021, Defendants filed a Motion to Dismiss Plaintiff's First Amended Complaint ("FAC") for a failure to state a claim. (*See* Motion to Dismiss FAC, Dkt. No. 35.) The FAC

alleged four causes of action against Defendants: discrimination, retaliation, and failure to hire under 42 U.S.C. § 1981 ("Section 1981"), and discrimination and retaliation under the Unruh Act. (*See* FAC, Dkt. No. 26.)

On December 20, 2021, this Court entered an Order (the "Order") dismissing almost the entirety of Plaintiff's FAC. (*See* Order, Dkt. No. 55.) It dismissed Plaintiff's Unruh cause of action with prejudice and permitted Plaintiff to proceed on his retaliation claim under Section 1981 **as to D&Y only**. (Order, Dkt. No. 55, 13:21-25, 14:1-4.) The Court dismissed the rest of the FAC with leave to amend, which consisted of a Section 1981 retaliation claim (against Team Health), a Section 1981 failure to hire claim (against both Defendants), and a Section 1981 discrimination claim (against both Defendants).[1] (Order, 55, Dkt. 55, 14-1:4.)

III. BACKGROUND OF PLAINTIFF'S ALLEGATIONS

A. In July 2020, Plaintiff Contracted With D&Y As A *Locum Tenens* Physician

Plaintiff contracted with D&Y, a *locum tenens* company,[2] to provide COVID medical services to inmates at the San Quentin Prison ("Prison") in Marin County, California from July 20, 2020 to August 20, 2020. (SAC, Dkt. 58, ¶ 12.) Plaintiff claims that VxL Enterprises, LLC's ("VxL")[3] Chief Medical Director "criticized" Plaintiff's job performance[4] and made discriminatory comments to him while Plaintiff worked at the Prison. (SAC, Dkt. 58, ¶¶ 15-17.) Plaintiff alleges that he complained about these comments to his contact at D&Y, Nicole Seibert, and was terminated shortly thereafter in July 2020. (SAC, Dkt. 58, ¶¶ 18-19.)

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[1] / Plaintiff abandoned his Section 1981 discrimination claim and did not pursue it in the SAC. (*See* SAC, Dkt. 58.)

[2] / "*Locum* [*tenens*] companies typically operate like a temporary staffing agency, placing physicians [they contract with] to work [at] their [health-care] client's facilities. (SAC, Dkt. 58, ¶ 11.)

[3] / Plaintiff alleges that VxL contracted with the California state prison system to provide COVID relief to inmates at the Prison. (SAC, Dkt. 58, ¶ 9.) VxL staffed the hospital with physicians that it acquired from *locum tenens* companies, including D&Y. (SAC, Dkt. 58, ¶ 11.)

[4] / Plaintiff claims that VxL's Chief Medical Director criticized Plaintiff for leaving the premises during working hours, being late to work, "skulking," and of not wearing proper protective gear. (SAC, Dkt. 58, ¶ 16.)

B. In August 2020, Plaintiff Filed An EEOC Charge Against D&Y And Later Initiated This Lawsuit Against Both Defendants Based On His Termination At The Prison

In August 2020, one month after Plaintiff was terminated by D&Y, Plaintiff filed a discrimination charge against D&Y with the Equal Employment Opportunity Commission ("EEOC.") (SAC, Dkt. 58, ¶ 24.) **The charge was not filed against Team Health.** (*See* SAC, Dkt. 58.) Sometime while Plaintiff's EEOC charge was pending, Plaintiff alleges that he engaged in confidential settlement negotiations with D&Y.[5] (SAC, Dkt. 58, ¶ 27.) He claims that D&Y requested that a resolution include a no-rehire provision and, as is standard practice for settlement agreements involving corporate entities, that the release extend to the defendant corporation's parents, affiliates or subsidiaries. (*See* SAC, Dkt. 58, ¶ 27.)

In June 2021, Plaintiff filed the original complaint in the instant action against both Defendants. (*See* Complaint, Dkt. 1.) The original complaint alleged discrimination and retaliation under Title VII of the Civil Rights Act and the California Fair Employment Housing Act (FEHA) based solely on Plaintiff's termination at the Prison.[6] (*See* Complaint, Dkt. 1.)

C. From May 2021 To The Present, Plaintiff Applied To Other Positions With Team Health

From May 2021 to the present, Plaintiff alleges that he applied to thirty-six separate jobs with Team Health, which spanned across two states, eight cities, and ten hospitals.[7] (SAC, Dkt. 58, Exh. 1.) He allegedly applied to fourteen of these positions **within a day** of filing iterations of the complaint.[8] (*See* SAC, Dtk. 58, Exh. 1.)

Notwithstanding the fact that some of these applications have only been pending for one month, Plaintiff alleges that Team Health's failure to hire him for all 36 positions constituted an unlawful

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[5] / Plaintiff does not state when these settlement communications occurred. (*See* SAC, Dkt. 58, ¶ 27.)

[6] / Plaintiff added a failure to hire claim in the FAC. (*See* FAC, Dkt. 26.)

[7] / Plaintiff alleges that several jobs were for traveling hospital positions, which would have required him to work in multiple locations across different cities. (SAC, Dkt. 58, Exh. 1.)

[8] / Plaintiff allegedly applied to three positions on the day he filed the Complaint, seven positions on the day before he filed the FAC, and four positions on the day he filed the SAC. (*See* SAC, Dkt. 58, Exh. 1.)

practice because Team Health acted based on any or all of the following three improper reasons: (1) as retaliation for complaining **to D&Y** in July 2020 about VxL's Chief Medical Director's discriminatory comments made at the Prison; (2) as retaliation for filing an EEOC charge **against D&Y** or rejecting its settlement proposal, which included a no-rehire provision, in or around August 2020, or (3) as retaliation for filing the instant action in June 2021. (SAC, Dkt. 58, ¶ ¶ 31, 47.)

Finally, Plaintiff claims that someone named Dr. Michael Hall, who worked as a Medical Director for some company,[9] told Plaintiff that "Team Health handles the screening and vetting of applicants" in connection with Plaintiff's June 16, 2021 application to work at the Walker Baptist Medical Center in Jasper, Alabama. (SAC, Dkt. 58, ¶¶ 32, 33.) Plaintiff also alleges that Dr. Hall said that a Team Health recruiter told Dr. Hall that Plaintiff "worked with them in the past." (SAC, Dkt. 58,¶ 34.)

IV. PLAINTIFF'S SAC IS SUBJECT TO A MOTION TO DISMISS UNDER RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM

To state a claim, a complaint must contain a "short and plain statement of the claim showing the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Dismissal under Rule 12(b)(6) is proper in the absence of sufficient facts alleged under a cognizable legal theory. *Zamani v. Carnes*, 491 F. 3d 990, 996 732 (9th Cir. 2007).

The Supreme Court has definitively ruled that stating a claim demands more than a mere "the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, pleadings offering labels, legal conclusions, or naked assertions devoid of further factual enhancement do not state a claim upon which relief may be granted. *Id.*; *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 555 (2007) ("a Plaintiffs' obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions and a formulaic recitation of the elements of a cause of action will not do.") (citation omitted).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Iqbal*, 556 U.S. at 678.

[9] / Plaintiff does not allege who employs or employed Dr. Hall.

In determining a motion to dismiss, the court need not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).

Claims only have plausibility sufficient to survive a motion to dismiss when they contain sufficient factual content for the Court to draw the reasonable inference that a defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678.

V. PLAINTIFF'S FIRST CAUSE OF ACTION FOR RETALIATION MUST BE DISMISSED AS TO TEAM HEALTH

Plaintiff's retaliation claim against Team Health must be dismissed because, as the Court implicitly recognized, **Team Health is not the proper defendant**.

"To establish a *prima facie* case of retaliation under Section 1981, a plaintiff must prove (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) there was a causal connection between the two." *Surrell v. Cal. Water Serv*, 518 F.3d 1097, 1108 (9th Cir. 2008) (indicating that a claim for retaliation, whether under Title VII or Section 1981, has the above elements.)

"In order to prevail on [a claim for retaliation], plaintiff would additionally have to show facts allowing an inference that defendant was aware plaintiff engaged in protected activity." *Tapia v. Boeing Co.*, 2021 WL 949622, at *6 (E.D. Cal. Mar. 12, 2021) (citations omitted.)

Here, Plaintiff's claim is based on the theory that D&Y terminated his employment at the Prison in retaliation for his complaining about VxL's Chief Medical Director's discriminatory comments. (SAC, Dkt. 58, ¶ 44.)

In its Order, the Court held that Plaintiff stated a plausible claim **against D&Y** because Plaintiff alleged that he complained **to D&Y** and then was terminated **by D&Y** on the same day or soon thereafter. (Order, Dkt. 55, 8:2-23, 13:22-25). Recognizing that Team Health is in a different position than D&Y, the Court denied the claim as to Team Health, and explained the issue in the context of Plaintiff's failure to hire claim:

> [I]t is not clear that Team Health knew about the complaint of race discrimination. **The complaint was made to D&Y, not Team Health.** Although Dr. Bibi has alleged that D&Y and Team Health are affiliated companies, that fact in and of itself makes Team Health's knowledge of the complaint only possible, **not plausible**.

(Order, Dkt. 55, 9:10-14; emphasis added.) Despite explaining to Plaintiff what would be required to plead the requisite "plausible" factual allegations to support this claim and properly amend his complaint, Plaintiff did not and could not add additional facts to state a claim against Team Health.

Plaintiff made no additional allegations that plausibly establish that Team Health is a proper defendant to this claim. He, again, **fails to specify any facts** that show that Team Health knew about Plaintiff's complaint made to D&Y. As the Court cautioned: "In the absence of a plausible allegation of knowledge on the part of Team Health, Dr. Bibi has not adequately alleged a causal connection between the protected activity and the adverse employment action." (Order, Dkt. 55, 9:14-16.)

This claim also fails for the additional reason that Plaintiff has failed to allege that Team Health had any influence over the adverse action, *i.e.*, D&Y's decision to terminate. Accordingly, Plaintiff's retaliation claim must be dismissed as to Team Health.

VI. PLAINTIFF'S SECOND CAUSE OF ACTION FOR FAILURE TO HIRE MUST BE DISMISSED AS TO BOTH DEFENDANTS

A. Plaintiff Cannot Establish That Team Health Knew About Any Protected Conduct Or Establish A Causal Connection Between Such Conduct And An Adverse Action

Plaintiff's failure to hire claim must be dismissed because Plaintiff cannot establish that Team Health knew about any protected conduct and because he cannot establish a causal connection between such conduct and an adverse action.

The SAC merely cites the same implausible theories that have already been rejected by the Court and fails to allege any additional facts that change the inevitable—that this claim does not pass muster.

1. The Court Already Determined That Racial Discrimination Cannot Serve As The Basis For His Failure To Hire Claim

The Court already dismissed Plaintiff's first theory that Team Health did not hire him because of his race: "There is nothing to indicate that … there was anyone at Team Health who had a racial animus or that similarly or less qualified individuals were hired instead of Dr. Bibi. Nor is there any alleged evidence of racial animus influencing Team Health's hiring decisions." (Order, Dkt. 55, 9:1-6.) **Plaintiff does not add any facts to remedy any of these defects.** Therefore, this theory cannot serve as the protected conduct for purposes of Plaintiff's failure to hire claim.

2. The Court Already Determined That Plaintiff's Complaint About Discriminatory Comments Cannot Serve As The Basis For His Failure To Hire Claim

Similarly, the Court already ruled that Plaintiff's complaint made to D&Y about VxL's Chief Medical Director's discriminatory comments cannot serve as the protected activity for his failure to hire claim because (1) Plaintiff failed to establish that Team Health knew about the complaint and (2) the timing does not support a causal connection given that the complaint occurred in July 2020 and the adverse action (*i.e.* an alleged failure to hire) did not occur until May 2021. (Order, Dkt. 55, 9:7-19.) In response to the Court's Order, Plaintiff added a few allegations purportedly related to the knowledge of Team Health. **None fix the problem.**

Plaintiff added an allegation that Dr. Hall, a Medical Director working for some unknown company, told Plaintiff that "Team Health handles the screening and vetting of applicants" in connection with his June 16, 2021 application to work at the Walker Baptist Medical Center in Jasper, Alabama, and that a Team Health recruiter told Dr. Hall that Plaintiff "worked with them in the past." (SAC, Dkt. 58, ¶¶ 32-34.) These are both red herrings.

First, there is no indication that Dr. Hall's statements relate to any of Plaintiff's other applications for employment, which concern jobs to be filled across different states, different cities, different facilities and are for different roles. (*See* SAC, Dkt. 58, Exh. 1.) Although Plaintiff has alleged that Dr. Hall made this comment regarding one of his applications, Plaintiff's failure to hire claim is based on 35 other applications. (*See* SAC, Dkt. 58, Exh. 1.) His allegation regarding Dr. Hall's statements about the job at the Walker Baptist Medical Center in and of itself only makes its broader application possible at best, not plausible.

Second, Dr. Hall's statements are not sufficient to plausibly establish that Team Health would know about Plaintiff's informal complaint about alleged discriminatory comments made by VxL's Chief Medical Director that occurred a year prior.

In any event, Plaintiff still cannot state a claim based on this theory because he does not, and cannot, allege any new facts to remedy the time lag noted by the Court:

> [T]he timing also does not support a causal connection between the protected activity and the adverse employment action. Dr. Bibi made the complaint about race discrimination

> to D&Y in July 2020. He did not apply for a Team Health job until almost a year later, in May 2021.

(Order, Dkt. 55, 9:16-19.) For these reasons, this theory cannot serve as a basis for Plaintiff's failure to hire claim.

3. The Court Already Determined That Plaintiff's Filing Of An EEOC Charge Cannot Serve As The Basis For His Failure To Hire Claim

The Court also considered Plaintiff's third theory that Team Health did not hire him because he filed an EEOC charge **against D&Y**, one of its subsidiaries, in August 2020. The Court rejected this theory because (1) Plaintiff failed to plausibly allege that Team Health knew about the EEOC charge and (2) Plaintiff could not overcome the time lapse:

> To the extent Dr. Bibi relies on the EEOC discrimination charge, there are still the problems of (1) no evidence of knowledge of the charge on the part of Team Health (presumably, the charge would have been made against D&Y only) and (2) timing lag.

(Order, Dkt. 55, 9:24-27.) Plaintiff has not remedied either issue.

Plaintiff cannot plausibly claim that Team Health had knowledge of Plaintiff's EEOC charge—the SAC does not allege that Team Health was a defendant to the EEOC charge, was otherwise referenced in the charging allegations, or had any involvement or role in the proceeding. The allegation that D&Y requested a no-rehire provision or that it conditioned any settlement on being binding as to its parents, affiliates or subsidiaries not change this result. Plaintiff does not allege that Team Health made the request and it is common practice for corporate entities to require that any release extend to cover its corporate organization. Such request does not plausibly impart knowledge on Team Health.

To the extent Plaintiff relies on Dr. Hall's comments to establish knowledge, such argument also fails. Nothing in Dr. Halls' statements plausibly establish that Team Health would know about an EEOC charge filed against D&Y, or that Dr. Halls' statements can be imputed to Team Health.

And, in any event, Plaintiff still cannot state a claim based on this theory because he does not and cannot allege any new facts to remedy the issue of the time lag identified by the Court—namely, that the EEOC charge was filed in August 2020 and the alleged failure to hire did not occur until May 2021. (Order, Dkt. 55, 9:24-27.) For these reasons, this theory cannot serve as a basis for Plaintiff's failure to hire claim.

4. The Court Already Determined That Plaintiff's Filing Of The Instant Complaint Cannot Serve As The Basis For His Failure To Hire Claim

The Court also examined—and rejected—Plaintiff's fourth theory that Team Health did not hire him because he filed the instant action on June 17, 2021. As the Court explained, Plaintiff, once again, faces a knowledge problem:

> The problem for Dr. Bibi is that, to support a claim for retaliation, he would need to show that the relevant hiring decisionmaker at Team Health knew or at least could have known about the lawsuit. But based on the allegations in the operative complaint, a reasonable inference cannot be made that litigation information would be passed on to hiring decisionmakers.

(Order, Dkt. 55, 10:6-10.) Nothing in the SAC leads to any conclusion—let alone a plausible conclusion—that individuals who were making the hiring decisions for positions in Alabama and Louisiana were aware that Plaintiff filed a lawsuit about conduct that allegedly happened in Northern California.

Additionally, and at minimum, considering that Plaintiff filed the original complaint on June 17, 2021, such a protected activity could not be the source of a failure to hire for the **eleven** positions he applied to **before** the date of his original complaint. (*See* SAC, Dkt. 58, Exh. 1.)

B. Plaintiff's Failure To Hire Claim Must Be Dismissed For The Additional Reason That It Fails To Set Forth Sufficient Facts To State A Claim

Plaintiff's failure to hire claim fails for the additional reason that it fails to set forth sufficient facts to state a claim.

In order to state a *prima facie* claim under Section 1981 for a failure to hire, a plaintiff must show that he "applied and was qualified for a job for which the employer was seeking applicants," that "despite [his] qualifications, [he] was rejected," and that "after [his] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Rowell v. Sony Pictures Television, Inc.*, 2016 WL 10644537, at *5 (C.D. Cal. June 24, 2016), *aff'd*, 743 F. App'x. 852 (9th Cir. 2018) (citations omitted.)

Here, Plaintiff has merely stated bare conclusory allegations that he "formally applied and otherwise expressed his interest in numerous available positions for which he was qualified [but] was not interviewed or otherwise considered." (SAC, Dkt. 58, ¶ 46.)

These bare assertions are mere "formulaic recitation of the elements" that "disentitles them from the truth." *Ashcroft*, 556 U.S. at 681 (citations and quotations omitted.)

Plaintiff's Exhibit 1 to the SAC entitled "**Team Health Jobs**" does not resolve the issue. Exhibit 1 is a chart merely identifies a "location," "facility,"[10] "date"[11] and "Job ID"[12] of thirty-six jobs. (SAC, Dkt. 58, Exh. 1.) It does not allege any facts supporting Plaintiff's allegation that Defendants unlawfully blacklisted him and failed to hire him for retaliatory reasons.

Indeed, the SAC alleges **no facts** to show:

- **whether and when** Plaintiff applied for each job;
- **whether** each job was open at the time Plaintiff allegedly applied;
- **what** each job required and **whether** Plaintiff was qualified;
- **whether**, after he was rejected for each job, each job remained open; and,
- **whether**, after he was rejected for each job, Team Health continued to seek applicants from persons of Plaintiff's qualifications.

This claim only tenders "naked assertion[s] devoid of further factual enhancement," which are insufficient to survive a motion to dismiss. *Ashcroft,* 556 U.S. at 678. (internal citations and quotations omitted). Plaintiff fails to make his *prima facie* case. The claim must be dismissed.

C. At Minimum, Plaintiff's Failure To Hire Claim Must be Dismissed As To D&Y

In its prior Order, the Court unequivocally stated that D&Y is not a proper defendant to Plaintiff's failure to hire claim:

> For the failure to hire claim, the correct defendant would appear to be Team Health, rather than D&Y – *i.e.* based on the FAC, it appears that Dr. Bibi applied for Team Health jobs, and not another job with D&Y.

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[10] / Plaintiff does not identify the "facility" for all of the thirty-six jobs identified in Exhibit 1 to the SAC. (*See* SAC, Dkt. 58, Ex. 1.)

[11] / Plaintiff's reference to the "date" of these jobs is ambiguous. (*See* SAC, Dkt. 58, Ex. 1.) For example, "date" could mean the date the position was posted or the date Plaintiff allegedly applied to the position.

[12] / Plaintiff does not identify the "Job ID" for all of the thirty-six jobs identified in Exhibit 1 to the SAC. (*See* SAC, Ex. 1.)

(Order, Dkt. 55, 8:25-27). The SAC does not allege that Plaintiff applied for any D&Y jobs after working at the Prison[13] or any other facts that would suggest that D&Y was the proper defendant. Thus, at minimum, the Court should dismiss D&Y as a defendant to this claim for failure to hire.

VII. PLAINTIFF SHOULD NOT BE PERMITTED LEAVE TO AMEND BECAUSE THE DEFICIENCIES IN THE SAC CANNOT BE CURED

If repleading cannot cure the deficiencies, the court may dismiss without leave to amend. *Harris v. Cty. of Orange*, 682 F.3d 1126, 1135 (9th Cir. 2012) ("Dismissal without leave to amend is appropriate only when the Court is satisfied that an amendment could not cure the deficiency"). The deficiencies outlined above cannot be cured. **Plaintiff has tried, *and failed,* to state a claim three times.** He has been on notice of what he needed to do to cure his prior deficiencies, and could not meet the required pleading standards. He should not be given a fourth opportunity.

VIII. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant its Partial Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and enter an order dismissing the First Cause of Action against Team Health and the Second Cause of Action against both Defendants without leave to amend.

DATED: February 22, 2022

SEYFARTH SHAW LLP

By: */s/ Lauren S. Schwartz*
Jonathan L. Brophy
Lauren S. Schwartz
Attorneys for Defendants
Daniel & Yeager, LLC and Team Health, LLC

[13] / That Plaintiff does not base his failure to hire claim on D&Y jobs cannot plausibly be challenged. Indeed, Plaintiff titled Exhibit 1, "**Team Health Jobs**."